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In the United States District Court

For the Eastern District of California, Fresno Division

Miguel Rodriguez Cortez and Desiree
Mercado,

Plaintiffs,

v.

County of Merced, et al.,

Defendants.

Case No. 1:20-cv-161-LJO-SAB

Joint Scheduling Report

Date: November 12, 2020

Time: 9:00 a.m.

Courtroom: 9

1 The following is the Joint Scheduling Report of Plaintiff, Desiree Mercado
2 and Defendants, County of Merced, Merced County Sheriff's Office, Vernon
3 Warnke, Joseph Royel, Julio Ibarra Perez, Nasir Wali, and Damian Sparks

4 **1. Summary of Factual and Legal Contentions**

5 A. Plaintiff Mercado contends: I find the defendants liable because the car
6 was shot at even on my side, when they knew I was inside the vehicle and I wasn't a threat at
7 all. I didn't know they were doing a gang task enforcement, I didn't know how connected he
8 meaning Miguel was to the things he was being accused of since then I have cut off contact
9 with him and basically everyone in the case I have a daughter I care for full time. So this case
10 wasn't my big concern I just wanted my phone back because they had pictures of my
11 daughter as a baby. Mr Merin said he was going to try to get my things back but then due to
12 me not having nothing to communicate with, he resigned as my attorney as of right now. I
13 understand the cops point of view I've read reports and I see Miguel was a bad person in their
14 eyes, which is why I no longer involve my self around him or his family any longer. I
15 honestly just wanted my phone back with my daughters pictures since then I have got a new
16 phone I have tried to contact Mark with then he told me he was no longer my attorney and
17 from there I kind of left everything alone because idk what to do next . Or even the status of
18 the case.

19 B. Defendants contend: There were no violations of law, no excessive
20 force, and the individual deputies are protected by qualified immunity. There is
21 no *Monell* violation.

22 This action arises from the lawful stop, pursuit, and arrest of Mr. Cortez,
23 then 18 years of age, on November 19, 2019, by members of the Merced County
24 Sheriff's Department. Ms. Mercado, then 23 years of age, was a willing occupant
25 of Cortez' car.

26 On the day of the incident, the Sheriff's Tactical and Recon Team (STAR)
27 learned that Mr. Cortez, a known member of the violent Sureno street gang, was
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1 in possession of firearms in the Hilmar/Stevinson area and was subject to search
2 at any time as a term of probation.

3 The STAR Team located Cortez in Hilmar, but out of concern for the many
4 people in the area, decided to follow him from a McDonald's. Cortez drove South
5 onto SR 165, a two-lane road that is also the center street of the town. An
6 unmarked car driven by Deputy Royel followed him. Royel's car and another
7 unmarked car driven by Deputy Ibarra, pulled out of the way letting Deputy
8 Sparks, in his marked Ford Explorer pull ahead of them.

9 Before long, Deputy Sparks observed traffic violations and initiated a
10 traffic stop on Cortez. (He also was aware from dispatch that Cortez did not have
11 a license.) Cortez finally pulled over after about one mile in a rural area outside
12 of Hilmar. Royel and Ibarra were well away from the scene. Deputy Wali,
13 another member of the STAR team, parked behind Sparks' car and walked toward
14 the passenger side of Cortez's car.

15 As shown on his body cam, Sparks positioned himself outside the driver's
16 door of the Cortez vehicle and spoke with Cortez and Ms. Mercado. The
17 conversation was amiable, but Cortez is seen to be fidgety and was repeatedly told
18 by Sparks to keep his hands on the steering wheel. Cortez was searching around
19 the car. Sparks asked Cortez if he was on probation and requested a license. He
20 said he was on probation, but he did not know why. Mercado produced an
21 identification card. She said the deputy was making them nervous. (This is
22 consistent with gang members' girlfriend's activities: to try to distract.) Sparks
23 saw the back seat had a lot of things in it, including beer. Sparks told Cortez to
24 take his seatbelt off with his right hand. Cortez then floored the accelerator to
25 escape the scene.

26 The deputies pursued him at speeds over 100 MPH on SR 165. Cortez
27 drove on the wrong side of the road several times, almost hitting other cars. At
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1 one point, Cortez made a sharp U-turn and Wali had to swerve to avoid getting
2 hit.

3 Cortez crashed his car into a fence leading to a park. The impact was not
4 significant. Although the area was very dark, the Cortez car was illuminated by
5 the arriving sheriff vehicles. Sparks arrived immediately after the Cortez car
6 came to a stop. He immediately exited his patrol car and ordered Cortez to put up
7 his hands. He saw movements indicating Cortez was moving his hands around
8 the car and saw Cortez' head go up and down. (His movements are corroborated
9 by Mercado's subsequent videotaped interview.) Wali pulled up and stopped to
10 the left of Sparks' car. Cortez started to exit the car and may have had his hands
11 up. Sparks believed Cortez was armed and that he was about to be in a gunfight
12 with him. He was aware that Cortez had a history of illegally possessing
13 automatic weapons. Seeing a threat to his life, Sparks opened fire at the car, very
14 quickly firing 14 times. Neither Cortez nor Mercado, was hit or injured in any
15 way. In the instant this happened, Cortez had gone back into the car.

16 By this time, Royel and Ibarra arrived in their respective cars, stopping to
17 the right of Sparks' car. They were watching the passenger door of the Cortez
18 vehicle, where Ms. Mercado was seated.

19 Cortez then put his hands outside the window. Sparks took this as
20 compliance and that Cortez was following directions. Cortez opened the door and
21 exited the vehicle. Sparks told Cortez to keep his hands up. He did so and then
22 closed the door with one of his hands. Sparks had not told him to do this.
23 Mercado was still in the car. Sparks told Cortez to turn away from him. Cortez
24 puts his hands down immediately toward his waist and began to lift his shirt. In
25 this fraction of a second, Sparks thought he was reaching for a gun and fired one
26 time at Cortez. Cortez went down immediately, shot in the leg.

27 As shown by the body camera footage, the incident where Cortez was shot
28 lasted only about four seconds. In fact, only 37 seconds elapsed from the first shot

1 upon Deputy Spark's arrival to the final shot, which wounded Mr. Cortez. The
2 initial stop before the attempted escape lasted approximately 5 minutes and 23
3 seconds. The pursuit from the attempted escape of the initial stop to the crash
4 lasted approximately 7 minutes and 43 seconds.

5 Ms. Mercado provided a videotaped post incident interview. She said
6 Cortez was lying when he told Sparks he was searching for his license, but he
7 kept looking for something in the car.

8 Ms. Mercado had met Cortez on Facebook only 4 days before the incident,
9 but was already communicating as if they were in a romantic relationship by
10 November 15th. Ms. Mercado was very aware of key aspects about Cortez before
11 the incident. She knew he was a gangster by his appearance, knew that he was
12 involved with illegal firearms, knew he was on probation, and knew of his
13 antipathy for police. Based on messaging, Defendants believe she knew he had
14 guns in the car. She consented to a search of her cell phone. The phone revealed
15 pre-incident chat messages. For example, on November 10th Cortez told her he
16 had made his Glock into an automatic weapon and provided a picture of the same.
17 He mentioned gunsmith and federal charges on top of enhancements. Other
18 pictures/chats depicted him with the weapons, and described that he "peeped an
19 automatic shotgun". On the same day, he sent her messages about seeing "pigs"
20 with each other, but he had to play it smooth because he would get off probation
21 on December 18. They were together on November 12th. The phone also had a
22 video taken while they were driving on November 12th depicting Cortez pulling
23 out a handgun from his front waistband and pointing it at the phone camera.
24 Another video shows him holding a loaded magazine. He also sent other pictures
25 of him holding handguns with extended magazines. The automatic weapon
26 referenced and shown in texts was later found in the car, within reach during the
27 incident. Another video shows law enforcement dealing with something on the
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1 roadway, then pans down to a leg showing a black firearm. Ms. Mercado certainly
2 knew what she was getting into with her relationship with Mr. Cortez.

3 A search of the car revealed methamphetamine found on the driver's side
4 door, a brown leather pistol holster on the back seat, and a .40 cal Glock pistol
5 with 13 (hollow point) rounds in a magazine and an attachment making the pistol
6 capable of automatic fire found under the driver's seat. (The automatic weapon
7 appears to be the same gun seen on Ms. Mercado's phone.) A shotgun and live
8 ammunition of various calibers were also found in the car.

9 C. Contested Facts

- 10 1. There are no contested facts.

11 D. Undisputed Legal Issues

- 12 1. Jurisdiction and Venue.
13 2. The stop of the vehicle was lawful.

14 E. Disputed Legal Issues

- 15 1. All other issues.
16 2. Whether this Court lacks jurisdiction over Defendants Sparks,
17 Wali, Royel, and Perez because they have not been properly served and service
18 has not been waived.

19 **3. Amendments to the Pleadings**

20 None are anticipated.

21 **4. Pending Matters**

22 There are no pending matters.

23 **5. Discovery Plan**

24 The parties anticipate taking depositions of witnesses and designating
25 expert witnesses as well as written discovery. Pursuant to Rule 26(f) of the
26 Federal Rules of Civil Procedure, the parties agree to the following discovery plan:

- 27 A. The parties shall exchange Initial Disclosures as required by Fed. R.
28 Civ. P. 26(a)(1) on or before December 2, 2020.

1 B. Discovery is needed on all of the issues involved in the case.
2 Discovery will be completed by the discovery cutoff date as set forth below. There
3 is no need for discovery to be conducted in phases, or be limited to or focused upon
4 particular issues.

5 C. Each party will be allowed 25 interrogatories to each side. A request
6 for the name and address of witnesses with knowledge of a fact, and identification
7 of documents supporting the same fact, and the name and address of the
8 custodian of those documents will count as one interrogatory.

9 D. The number of depositions allowed by Fed. R. Civ. P. 30(a)(2)(A) is
10 sufficient, except that depositions of designated expert witnesses will not count
11 against the limit. The duration of depositions specified by Fed. R. Civ. P. 30(d)(2)
12 is sufficient.

13 E. The number of requests for admission will not be limited.

14 F. In order to allow ample time for discovery of experts, all parties
15 should disclose expert witnesses approximately two months prior to the close of
16 expert discovery.

17 G. All discovery limits and deadlines will be subject to change by
18 written agreement of the parties without the need for court order or by court
19 order pursuant to noticed motion.

20 H. The parties do not anticipate taking discovery outside of the United
21 States.

22 I. The parties anticipate video recording of depositions.

23 J. Electronic Discovery. The defendants will reasonably review their
24 respective computer files, applicable, to ascertain the contents thereof; including
25 archival and legacy data (outdated formats or media), and disclose in initial
26 discovery (self-executing routine discovery) the computer-based evidence which
27 may be used to support claims or defenses. Ms. Mercado will review and provide
28 all electronic communications with Mr. Cortez both before and after the incident,

as well as all audio, video, photographic and other electronic evidence in her possession, custody, and control.

6. Dates Agreed By All Parties

Fed. R. Civ. P. 26(a)(1) Disclosure Exchange December 3, 2020
Non-Expert Discovery Cut-Off April 2, 2021
Expert Disclosure Deadline May 7, 2021
Rebuttal Expert Disclosure Deadline May 28, 2021
Expert Discovery and Deposition (Completion) Deadline: June 25, 2021
Non-Dispositive and Dispositive Motion Filing Deadline: July 30, 2021
Pre-Trial Conference Date: October 12, 2021
Trial Date (3-5 Days): December 7, 2021

7. Settlement

Defendant does not see a settlement conference as a feasible option at this time.

8. Jury Trial Demand

Plaintiff and Defendants demand a trial by jury.

9. Trial Estimate

The parties estimate 3-5 days.

10. Consent to Proceed Before a United States Magistrate Judge

Defendants consent to proceed before a United States Magistrate Judge.

11. Bifurcation

Any claim for punitive damages should be bifurcated.

12. Related Cases

There are no related cases. Mr. Cortez's portion of the case has been dismissed.

13. Other matters

None.

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Dated: November 3, 2020

/s/ Viktoria Desiree Mercado

Viktoria Desiree Mercado, plaintiff

Dated: November 4, 2020

Forrest W. Hansen
Merced County Counsel

By: */s/ Janine Highiet-Ivicevic*

Janine L. Highiet
Deputy County Counsel
County of Merced

Attorneys for Defendants County of
Merced, Merced County Sheriff's
Office, Vernon Warnke, Joseph
Royel, Julio Ibarra Perez, Nasir
Wali

Authorized e-signature: Nov. 4, 2020

Dated: November 3, 2020

Berry Wilkinson Law Group

By: *Alison Berry Wilkinson*

Alison Berry Wilkinson
Attorneys for Defendant
Damian Sparks